Filed 5/24/10 P. v. Valenzuela CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVID ALEXANDER VALENZUELA, Defendant and Appellant.	E047769 (Super.Ct.No. RIF144888) O P I N I O N

APPEAL from the Superior Court of Riverside County. Michelle D. Levine, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and William Wood and Gary W. Brozio, Deputy Attorney Generals, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant David Alexander Valenzuela guilty as charged of a single count of first degree burglary. (Pen. Code, § 459; count 1.)[1] The evidence showed he entered the Moreno Valley home of Raul Magana on July 29, 2008, with the intent of taking property from the home. Magana's neighbor, Veronica Llamas, reported the burglary to police. Defendant was also charged with the attempted burglary of Llamas's residence during March 2008 (§§ 664, 459; count 2), but the jury found him not guilty of that charge. Defendant admitted he had two prior strikes and four prison priors. After denying defendant's *Romero*[2] motion to strike one or more of his prior strikes, the trial court sentenced him to 25 years to life plus four years in prison.

Defendant appeals. He first claims the trial court prejudicially erred in failing to instruct the jury on trespass as a lesser included offense of burglary in count 1 under the accusatory pleading test. We conclude the trial court properly refused to instruct on trespass in count 1 because there was insufficient evidence that defendant merely trespassed into Magana's home but did not burglarize it. In other words, there is insufficient evidence he committed the lesser offense but not the greater.

Defendant further claims the trial court erroneously admitted evidence of the March 2008 attempted burglary of Llamas's home (count 2) as evidence he intended to burglarize Magana's home in July 2008 (count 1). We reject this claim. First, the court

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

did the opposite of what defendant claims: it admitted evidence of the July 2008 burglary for the limited purpose of showing defendant *intended* to burglarize Llamas's home in March 2008. (Evid. Code, § 1101, subd. (b).) Second, because defendant was found not guilty of attempting to burglarize Llamas's home (count 2), any erroneous admission of evidence on that count did not prejudice him.

Third, and finally, defendant claims the trial court abused its discretion in denying his *Romero* motion. In view of defendant's nearly 30-year criminal history and continuous failure to reform, we conclude the motion was properly denied.

II. FACTUAL BACKGROUND

A. *Prosecution Evidence*

During the afternoon of July 29, 2008, Magana, who was at work, received a call from police, advising him to come home because someone had been inside his Moreno Valley house. Magana lived in the house with his wife and four children. When he arrived home, Magana discovered that closets and drawers had been emptied and clothing and other items were strewn around the backyard. A bedroom window had also been broken. When Magana left for work shortly before 5:00 a.m. that morning, the doors and the gate to the backyard were locked and the house was in order. Magana did not know defendant, and defendant did not have permission to be inside Magana's house.

Around 1:30 p.m. on July 29, Magana's neighbor, Veronica Llamas, called 911 after she noticed two men walking toward Magana's house. Llamas saw the men walk into Magana's driveway and toward the front of his house, but she could not see whether

either of them entered Magana's house. Llamas identified defendant at trial as one of the two men. The second man was a young African-American.

Llamas was suspicious and called police because she knew no one was home at the Magana house and because she recognized defendant from an earlier encounter she had with him in March 2008. In March 2008, someone rang Llamas's doorbell, and by the time Llamas came to her door several minutes later, defendant was "messing with [her] fence" and "trying to get into [her] fence." When she asked defendant what he was doing, he said he was looking for his Chihuahua, but right after he said that he ran away. He did not have a leash or dog carrier. Llamas's gate was locked and there were no holes or cracks where a small dog could get through. The March 2008 incident occurred during the daytime.

Around 1:40 p.m. on July 29, Rosa Manzano, another neighbor of Magana, saw a young Black man in her front yard, walking very fast. At the same time, Manzano heard police helicopters. Manzano did not see where the young man had come from, nor did she see defendant. However, around the same time Manzano saw the young Black man in her front yard, her 12-year-old daughter saw defendant jump over the family's backyard fence. Defendant apologized to Manzano's daughter and said someone was chasing him.

Around 1:30 p.m. on July 29, Sheriff's Deputy Martineau Belgarde was dispatched to the Magana home to investigate two suspicious men in the area. When he arrived, he saw two men in the backyard of Magana's house. The men crouched down

when they saw the deputy, then walked to the rear of the house. Both were wearing white T-shirts. The deputy immediately summoned additional units to prepare a perimeter around the house and the neighborhood.

Moreno Valley Police Officer Victor Magana was also dispatched to the Magana home to investigate a possible burglary and to search for a suspect. He and other officers set up a perimeter around the home, and he later found defendant walking on a nearby street, away from the area of the Magana house. When defendant saw the officer's patrol car, he abruptly changed direction and walked into a parking lot. The officer drove over a sidewalk and blocked defendant's path. Defendant was out of breath and sweating profusely, and had blood on his right forearm. He was wearing a white shirt.

B. *Defense Evidence*

Defendant testified in his own defense. Around 12:00 p.m. on July 29, 2008, he was drinking beer in his front yard with his stepfather. He consumed two to three beers that day. While sitting in his yard, an African-American man was walking up and down the street looking for bottles and cans from the yards of empty houses. Defendant had seen the man on his street several times before and had spoken to him at least once before.

At some point, defendant went into the house and asked his mother for money to go to the store and buy soda and beer. After getting the money from his mother, he left his yard to walk to the store. As he was walking, the African-American man approached

and engaged him in conversation. The man asked if he could walk with defendant to the store, and defendant agreed.

As they walked along, the man stopped and pointed to the Magana house. He told defendant the homeowners had left some stuff in the backyard for him to pick up, and asked defendant whether he wanted to go to the house with him. Defendant walked to the Magana house with the man. As the man was about to jump over the fence to retrieve the things that had been left for him, defendant advised him to first knock on the front door or ring the bell. The man did so, but after four or five minutes no one came to the door. The man then walked to the side of the house and jumped over the fence.

As defendant waited in the front yard, he heard the man going through "some things" and making noise in the backyard. After he waited in the front yard for seven to eight minutes, he noticed a police car approaching the house. This frightened him because he was intoxicated and had been arrested for public intoxication in May 2008, so he jumped over the fence and began running. He cut his arm and hand while he was running.

Regarding the March 2008 incident at the Llamas house, defendant explained he was looking for "some dogs" his mother had lost. He knocked on the doors of several houses, including the Llamas house. After no one answered the door at the Llamas house, he walked to the fence, put his hands on the fence, and looked over into the yard. He did not go into the yard or attempt to knock down the fence. At some point, Llamas

came out of her house and said: "What the fuck are you doing in my yard?" Defendant told Llamas he was looking for a dog, then he left the yard and walked away.

Defendant admitted lying to the police about incurring the injuries to his arm and hand while doing housework, and about never going to the Magana house. He lied because he knew he had trespassed onto the property. Under cross-examination, defendant insisted he was intoxicated when he jumped over the fence of the Magana house around 1:30 p.m., even though he had started drinking around 9:30 a.m. and had consumed only two to three beers.

Defendant also admitted he had been convicted of theft in 1993 and had pled guilty to first degree residential burglary in 1995 and receiving stolen property in 1999. He pled guilty to the 1995 and 1999 crimes because he had committed them. He pled not guilty in the present case because he was innocent of the charges.

III. ANALYSIS

A. *The Trial Court Properly Refused to Instruct on Trespass as a Lesser Included Offense of Burglary in Count 1*

Defendant first contends the trial court prejudicially erred in failing to instruct on trespass as a lesser included offense of burglary in count 1 under the accusatory pleadings test. We disagree.

A trial court has a duty to instruct sua sponte on any uncharged offense that is lesser than and included in a greater offense, but only if substantial evidence shows the defendant committed the lesser offense and not the greater. (*People v. Parson* (2008) 44

Cal.4th 332, 348-349.) For the purpose of instructing on lesser included offenses, two tests apply in determining whether an uncharged offense is included within a charged offense: the elements test and the accusatory pleading test. (*Id*. at p. 349.) "[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense [the elements test], or the facts actually alleged in the accusatory pleading [accusatory pleading test], include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117 (*Birks*).)

Defendant concedes that our state Supreme Court has determined that trespass is not a lesser included offense of burglary under the elements test because burglary, or the entry of specified places with intent to commit theft or a felony (§ 459), can be perpetrated without committing any form of criminal trespass. (See *Birks, supra*, 19 Cal.4th at p. 118, fn. 8 ["It appears well settled that trespass is not a lesser necessarily included offense of burglary . . . ."]; *People v. Lohbauer* (1981) 29 Cal.3d 364, 369 [trespass requires entry without the consent of the owner, but burglary may be committed by one who has permission to enter a dwelling]; *People v. Pendleton* (1979) 25 Cal.3d 371, 382 [same].) Defendant further acknowledges that this court is bound by the decisions of the state Supreme Court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *People v. Zichwic* (2001) 94 Cal.App.4th 944, 952-953), but argues that trespass is a lesser included offense of burglary under the accusatory pleading test, or as charged in the information.

As noted, under the accusatory pleading test, a lesser offense is included within a greater charged offense "if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense . . . . [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.)[3] Here, the information alleged in count 1 that defendant committed "a violation of Penal Code section 459, a felony, in that on or about July 29, 2008 . . . he did wilfully *and unlawfully* enter a certain building, to wit, an inhabited dwelling house, located at [the Magana house] with intent to commit theft and a felony." (Italics added.)

Burglary is committed by any "person who enters any house . . . with intent to commit grand or petit larceny or any felony[.]" (§ 459). In contrast to burglary, trespass is committed by one "who enters or remains in any noncommercial dwelling house, apartment, or other residential place *without consent of the owner, his or her agent, or person in lawful possession* . . . ." (§ 602.5, italics added; *People v. Farrow* (1993) 13 Cal.App.4th 1606, 1618 [Fourth Dist., Div. Two].)

---

[3] The *Birks* court explained why California trial courts have long been required to instruct sua sponte on lesser offenses that are necessarily included in an accusatory pleading charging a greater offense, if substantial evidence shows the defendant is guilty of the lesser included offense but not the greater: "When an accusatory pleading alleges a particular offense, it thereby demonstrates the prosecution's intent to prove all the elements of any lesser necessarily included offense. Hence, the stated charge notifies the defendant, for due process purposes, that he must also be prepared to defend against any lesser offense necessarily included therein, even if the lesser offense is not expressly set forth in the indictment or information. [Citations.] The statutory law of California explicitly provides that the defendant may be found guilty 'of any offense, the commission of which is *necessarily included* in that with which he is charged.' (§ 1159, italics added.)" (*Birks, supra,* 19 Cal.4th at p. 118.)

Defendant argues that the use of the term "unlawfully" in count 1 to describe his entry into the dwelling house effectively incorporated or charged the crime of trespass, or an unlawful entry without the consent of the owner. He emphasizes that neither the phrase nor the concept of "unlawful entry" is used in the statutory definition of burglary (§ 459), but is sufficiently broad to encompass the entry of a dwelling house without the consent of the owner (§ 602.5). Thus, he argues, he was effectively charged in count 1 with an unlawful entry or trespass.

There are very few published decisions giving guidance concerning the use of the word "unlawfully" in a pleading charging burglary. The *Birks* court, seemingly in dicta, addressed the issue in a footnote. The court stated: "It appears well settled that trespass is not a lesser necessarily included offense of burglary [under the elements test], because burglary, the entry of specified places with intent to steal or commit a felony [citation], can be perpetrated without committing any form of criminal trespass [citation]. [Citations.] *Nor did the allegations set forth in Count 1 of the instant information necessarily include criminal trespass. Count 1 simply alleged that defendant 'did willfully and unlawfully enter a commercial building . . . with intent to commit larceny and any felony.*'" (*Birks, supra*, 19 Cal.4th at p. 118, fn. 8, italics added.) The court did not address the question defendant raises here: whether the use of the term "unlawful" to describe the entry of a dwelling necessarily encompasses, includes, and effectively charges, the lesser offense of trespass. (*Ibid*.)

Two years after *Birks*, was decided, the question of whether trespass was pleaded as a lesser included offense of burglary in an accusatory pleading was in issue in *People v. Waidla* (2000) 22 Cal.4th 690, 732-735. *Waidla* involved the murder of a woman in her home allegedly by the defendant and his friend. (*Id.* at p. 710.) The court accepted the defendant's argument that trespass was a lesser included offense of burglary under the accusatory pleading test "[f]or purposes of discussion only[.]" (*Id.* at p. 733.) The court went on to determine that insufficient evidence supported a trespass instruction—without discussing whether the accusatory pleading charging burglary effectively charged the lesser offense of trespass. *Waidla* may call into question the state Supreme Court's footnote 8 in *Birks*. (*Birks, supra,* 19 Cal.4th at p. 118, fn. 8.)

Black's Law Dictionary may also provide some guidance on the issue. Like section 602.5, which defines the crime of trespass, it defines "unlawful entry" as "[t]he crime of entering another's real property, by fraud or other illegal means, without the owner's consent." (Black's Law Dict. (8th ed. 2004) p. 574, col. 1.) Accordingly, the inclusion of the word "unlawfully" to describe the entry into a dwelling or structure in a burglary charge tends to indicate that the entry was without the permission of the owner and would render trespass a lesser included offense under the accusatory pleading test.

In any event, and regardless of the persuasiveness of defendant's argument, it is unnecessary for this court to determine whether the use of the term "unlawfully" in count 1 effectively pled the lesser offense of trespass. At most, the information charged defendant with trespassing into the Magana house, not the backyard. And there was no

substantial evidence that defendant was guilty of trespassing into the Magana house without the owner's consent, but not burglarizing it. As noted, a trial court has no duty to instruct on an uncharged lesser offense if there is no substantial evidence supporting a jury determination that the defendant was in fact guilty only of the lesser offense. (*People v. Parson*, *supra*, 44 Cal.4th at pp. 348-349).

The prosecution's evidence showed defendant entered the Magana house with the intent of taking personal property from the home. Magana's neighbor, Llamas, saw defendant and a young African-American man approach the house. The house had been ransacked and clothing and other items were strewn in the backyard, but the house was in order when Magana left for work that morning. Based on the prosecution's evidence, no reasonable juror could have concluded that defendant merely entered the Magana house without the owner's consent, and *without* intending to commit theft or a felony.

And, according to defendant, *he never entered the Magana house*. Instead, he claimed he waited in the front yard for several minutes until he noticed a police car approaching the house. He then jumped over the fence surrounding the Magana house and began running toward the back. Thus, under defendant's version of events, he did not trespass into the Magana house. At most, he was guilty of trespass into the backyard, but that cannot be a lesser included offense of the *residential* burglary as charged in count 1 of the information, or residential trespass. An instruction on trespass in count 1 was therefore properly refused.

B. *No Improper Other Crimes Evidence Was Admitted on Count 1*

Defendant next claims the trial court erroneously allowed the prosecution to use evidence of the March 2008 attempted burglary of the Llamas house, as charged in count 2, as evidence he committed or intended to commit theft in the "unrelated burglary of the Magana house" on July 29, 2008, as charged in count 1. Defendant is mistaken. The court did not instruct the jury as defendant claims.

In pertinent part, Judicial Council of California Criminal Jury Instructions, CALCRIM No. 375 instructed the jury: "If you decide that the defendant committed the 1995 Burglary or if you decide the defendant committed the offense of Burglary as charged in Count 1, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not: [¶] The defendant acted with the intent to commit theft in this case."

The instruction *did not* tell the jury it could use any evidence of the March 2008 attempted burglary to prove defendant intended to commit theft in count 1. Nor did the prosecutor argue that the March 2008 attempted burglary showed defendant intended to commit theft in the July 29, 2008 burglary. Instead, the prosecutor argued that defendant's act of jumping over the gate in the July 29, 2008 burglary showed he intended to commit theft when he was at the gate of the Llamas house in March 2008. For these reasons, we reject defendant's claim. Further, any error in allowing the jury to consider evidence of the uncharged 1995 burglary or the charged July 29, 2008 burglary

of the Magana house to show defendant intended to commit theft in count 2 was not prejudicial, because defendant was found not guilty in count 2.

C. *Defendant's Romero Motion Was Properly Denied*

Lastly, defendant claims the trial court abused its discretion in denying his *Romero* motion to strike one or both of his prior strike convictions. We disagree. The motion was properly denied in view of defendant's lengthy, nearly 30-year criminal history, and his numerous parole violations.

At sentencing, defendant requested that the trial court exercise its discretion to strike one or more of his prior strike convictions. (§ 1385, subd. (a).) A trial court has discretion to dismiss a prior strike conviction in furtherance of justice. (§ 1385, subd. (a); *Romero, supra,* 13 Cal.4th at pp. 529-530.) The court's decision is reviewed for an abuse of discretion (*People v. Williams* (1998) 17 Cal.4th 148, 152), and is guided by the following standard: "[W]hether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Id*. at p. 161.)

In denying the motion, the court noted that defendant's current burglary conviction was not an isolated act of criminal conduct and was supported by overwhelming evidence. The court also relied on defendant's nearly 30-year criminal history, which included numerous theft and theft-related offenses and poor performance on parole.

Defendant's criminal history began in 1981 with second degree burglary and continued through the present burglary of the Magana house in 2008. In sum, the court considered defendant's lengthy criminal history and decided he was within the scheme and spirit of the "Three Strikes" law. There was no abuse of discretion.

A trial court abuses its discretion in striking a prior conviction if it is "'guided solely by a personal antipathy for the effect that the [T]hree [S]trikes law would have on [a] defendant,' while ignoring 'defendant's background,' 'the nature of his present offenses,' and other 'individualized considerations.' [Citation.]" (*Romero, supra,* 13 Cal.4th at p. 531.) However, that is precisely what defendant would have this court do. Defendant argues the trial court failed to credit the fact that he has never used force in any of his past crimes. His counsel argues: "While it is true he is a thief, [he] is not violent." The aim of the Three Strikes law is not increasing the sentences of *only* violent criminals, however. "The Three Strikes law consists of two, nearly identical statutory schemes designed to increase the prison terms of *repeat* felons." (*Id.* at p. 504, italics added.) Nonviolence is not dispositive.

Defendant relies on *People v. McGlothin* (1998) 67 Cal.App.4th 468, 474 (*McGlothin*) and *People v. Cluff* (2001) 87 Cal.App.4th 991, 1004 (*Cluff*) for the proposition that if the balance falls clearly in favor of a defendant, the trial court should exercise its discretion to strike a prior strike conviction in the interest of justice. Neither case supports defendant's position.

In *McGlothin*, the trial court struck one of the defendant's prior strike convictions because he had committed two crimes within 60 days of one another at a time when he "'was going through a . . . difficult social situation[.]'" (*McGlothin, supra,* 67 Cal.App.4th at p. 476.) The appellate court reversed, reasoning that the record did "not establish that there was anything particularly remarkable about defendant's social situation at the time he committed the two previous robberies" and because, as the trial court itself acknowledged, the defendant's criminal history was especially extensive. (*Id*. at pp. 476-478.) *McGlothin* actually undercuts defendant's position because his criminal history, too, was extensive.

In *Cluff*, the appellate court concluded that the trial court had abused its discretion in refusing to strike one of the defendant's prior strikes, in part because the defendant did not have recidivist tendencies and the trial court failed to base its decision on the defendant's individual history, character, and prospects. (*Cluff, supra,* 87 Cal.App.4th at p. 1004.) That is not the case here. Here, the trial court considered defendant's history, character, and prospects, and based on these factors properly denied his *Romero* motion.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Richli
J.